4-21-1970

House of Representatives Proposed Impeachment of an Associate Supreme Court Justice

Paul Norton McCloskey Jr.

(NOT PRINTED AT GOVERNMENT EXPENSE)

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 91st CONGRESS, SECOND SESSION

Vol. 116 WASHINGTON, TUESDAY, APRIL 21, 1970 No. 63

House of Representatives

PROPOSED IMPEACHMENT OF AN ASSOCIATE SUPREME COURT JUSTICE

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from California (Mr. McCLOSKEY) is recognized for 60 minutes.

Mr. McCLOSKEY. Mr. Speaker, I rise in response to the remarks of my distinguished leader, the gentleman from Michigan (Mr. GERALD R. FORD) last Wednesday evening, when he set forth his views of the constitutional power of impeachment and stated certain facts and opinions which, in his judgment, justified his vote for the immediate impeachment of Associate Supreme Court Justice William O. Douglas. The dialog which ensued is reported in the CONGRESSIONAL RECORD of April 15, 1970, at pages H3112 through H3127.

I respectfully disagree with the basic premise "that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

To accept this view, in my judgment, would do grave damage to one of the most treasured cornerstones of our liberties, the constitutional principle of an independent judiciary, free not only from public passions and emotions, but also free from fear of executive or legislative disfavor except under already-defined rules and precedents.

The arguments presented last Wednesday raise grave constitutional issues, and I hope my colleagues will understand that I speak not in derrogation of my leader's judgment, but to express a differing view of the law of impeachment and the criteria to be applied by the House to conduct attributed to a member of the Judiciary. I do not speak in defense of Justice Douglas, whom I have met but once many years ago. I would like to speak, however, for the principle of judicial independence and the concept that Congress should not challenge a sitting judge except under the clearest showing of misconduct.

Also, in view of the fact that the issues are those of law and precedent, I think it especially incumbent on those of us who are lawyers to discuss all aspects of the case from the various points of view traditional to our profession.

The first two sentences of the canons of ethics of the American Bar Association impose a special duty on lawyers:

> It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor.

In my State of California, the attorney's duty to the courts has been referred to as among the foremost of his obligations.

> The members of the legal profession should, above all other members of society, be the first to uphold the dignity of judicial tribunals and to protect them against falling into that disrepute to which they would be hastened if proceedings before them were conducted without order or decorum. . . . *Platnauer* v. *Superior Court*, 32 Cal. App. 463, 473 (1917).

Attorneys must observe the principles of truth, honesty, and fairness, especially in criticism of the courts. In re Humphrey, 174 Cal. 290, 295 (1917).

No one would question that our duties to the Nation as Members of Congress supersede any duty to the courts occasioned by our professional background, but I do think the canons and court decisions lend support to the tradition of this Nation that our courts are not to be attacked in the same manner that we might criticize political opponents or members of the executive branch.

It also seems appropriate for Members of the House who are also privileged to be members of the bar to lay before the House such historical facts, interpretations, and legal argument as may warrant a stricter construction of the term "good behavior" than those urging impeachment have suggested.

First, I should like to discuss the concept of an impeachable offense as "whatever the majority of the House of Representatives considers it to be at any given time in history." If this concept is accurate, then of course there are no limitations on what a political majority might determine to be less than good behavior. It follows that judges of the Court could conceivably be removed whenever the majority of the House and two-thirds of the Senate agreed that a better judge might fill the position. But this concept has no basis, either in our constitutional history or in actual case precedent.

The intent of the framers of the Constitution was clearly to protect judges from political disagreement, rather than to simplify their ease of removal.

The Original Colonies had had a long history of difficulties with the administration of justice under the British Crown. The Declaration of Independence listed as one of its grievances against the King:

> He has made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries.

The signers of the Declaration of Independence were primarily concerned about preserving the independence of the judiciary from direct or indirect pressures, and particularly from the pressure of discretionary termination of their jobs or diminution of their salaries.

In the debates which took place in the Constitutional Convention 11 years later, this concern was expressed in both of the major proposals presented to the delegates. The Virginia and New Jersey plans both contained language substantively similar to that finally adopted, as follows:

> Article III, Section 1 states "The Judges, both of the Supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The "good behavior" standard thus thus does not stand alone. It must be read with reference to the clear intention of the farmers to protect the independence of the judiciary against executive or legislative action on their compensation, presumably because of the danger of political disagreement.

If, in order to protect judicial independence, Congress is specifically precluded from terminating or reducing the salaries of Judges, it seems clear that Congress was not intended to have the power to designate "as an impeachable offense whatever a majority of the House of Representatives considers it to be at a given moment."

If an independent judiciary is to be preserved, the House must exercise decent restraint and caution in its definition of what is less than good behavior. As we honor the Court's self-imposed doctrine of judicial restraint, so we might likewise honor the principle of legislative restraint in considering serious charges against members of a coequal branch of Government which we have wished to keep free from political tensions and emotions.

The gentleman from Michigan has properly mentioned the analogy of impeachment to a prosecution, with the House acting as prosecutor, the Senate sitting as judge and jury. In this connection impeachment itself is a judicial proceeding with roots going back in our colonial history long preceding the adoption of the Constitution itself.

The Fundamental Orders of Connecticut, adopted in 1638, first gave the power to the colonial assembly to remove officials, and the Charter of Rhode Island in 1663 used the term "impeachment" for this removal process. William Penn's proposed Frame of Government in 1682 provided for prosecution of impeachment by the general assembly with trial of the impeachment by the Pennsylvania Council, or upper house, and this principle was later adopted in various forms in the constitutions of a number of the original 13 States.

There is considerable evidence in the adoption of the Constitution itself that the Founding Fathers considered impeachment as analogous to criminal proceedings. The first full draft of a constitution, presented by the Committee of Five on August 6, 1787, contained a specific clause:

> The trial of all criminal offences (except in cases of impeachment) shall be in the state where they shall be committed; and shall be by jury.

Under common law, a prosecutor must generally prove his case beyond a reasonable doubt. The presumption that a man is innocent until proven guilty by persuasive evidence is one which binds prosecutors as well as judges.

No prosecutor, for example, should take a case before the court unless he is reasonably satisfied of the guilt of the accused. Merely "thinking" that the accused is possibly guilty is not enough. I suggest that the hope that further investigation may develop facts which will prove his case should not justify the prosecutir's institution of a criminal charge, nor should it justify the House in filing an impeachment if impeachment is indeed analogous to a criminal proceeding.

There is a far graver question, however, with the argument that "good behavior," or lack of it, is whatever the majority of the House wants to make it.

The term "good behavior," as the Founding Fathers considered it, must be taken together with the specific provisions limiting cause for impeachment of executive branch personnel to treason, bribery or other high crimes and misdemeanors. The higher standard of good behavior required of Judges might well be considered as applicable solely to their judicial performance and capacity and not to their private and nonjudicial conduct unless the same is violative of the law. Alcoholism, arrogance, nonjudicial temperament, and senility of course interfere with judicial performance and properly justify impeachment. I can find no precedent, however, for impeachment of a Judge for nonjudicial conduct which falls short of violation of law.

In looking to the nine cases of im-

peachment of Judges spanning 181 years of our national history, in every case involved, the impeachment was based on either improper judicial conduct or nonjudicial conduct which was considered as criminal in nature.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I will yield.

Mr. GROSS. What is nonjudicial conduct of a judge? Conduct that takes place when he is not sitting as a judge? How can there be nonjudicial conduct?

Mr. McCLOSKEY. In the sense I use these terms, judicial conduct would be in the conduct of his office on the bench and nonjudicial conduct would be his private and personal life off the bench and utterances unconnected with the performance of his judicial duties. That is the sense I use it in this discussion.

Mr. GROSS. What the gentleman is saying, then, is if he wants to be a Lothario, that is all right as long as it does not involve what he is actually doing on the bench. Is that what the gentleman is saying?

Mr. McCLOSKEY. If his private or personal life should constitute a violation of criminal or civil law, then, in my judgment, it would justify impeachment for the failure of good behavior. If, on the other hand, his private life might be such as to cause blame to fall on him on the part of some, but not others, then I think that the Congress as its peril goes into the question of reaching for the first time a definition of what is different, rather than good, behavior.

Let me continue, if I may, and I will yield further as I try to bring out this point.

Mr. PUCINSKI. Mr. Speaker, will the gentleman yield on that very point?

Mr. McCLOSKEY. Yes. I yield to the gentleman.

Mr. PUCINSKI. I wonder if the gentleman will clarify this hypothesis. Is it within the purview of proper conduct for a member of the Supreme Court, an associate justice, to permit his publisher to publish his works in a magazine that has a cartoon of the President of the United States comparing him to King George III of England when this very judge may be sitting and every day does sit on matters involving the executive branch of Government? Does it come within the purview of proper conduct?

Mr. McCLOSKEY. The question that the gentleman asks is, Should a man permit his publisher to publish something of his, and I would like to state it has been my privilege as a private attorney to represent both authors and publishers. The standard form of contract between an author and a publisher places that discretion entirely in the hands of the publisher later on with no power on the part of the author to say to the publisher where it is and where it is not reprinted. I will make that point specifically a little later on, if I may.

From the brief research I have been able to do on these nine cases, and as reflected in the Congressional Quarterly of April 17, 1970, the charges were as follows:

District Judge John Pickering, 1804: Loose morals, intemperance, and irregular judicial procedure.

Associate Supreme Court Justice Samuel Chase, 1805: Partisan, harsh, and unfair conduct during trials.

District Judge James H. Peck, 1831: Imposing an unreasonably harsh penalty for contempt of court.

District Judge West H. Humhpreys, 1862: Supported secession and served as a Confederate judge.

District Judge Charles Swayne, 1905: Padding expense accounts, living outside his district, misuse of property and of the contempt power.

Associate Court of Commerce Judge Robert Archbald, 1913: Improper use of influence, and accepting favors from litigants.

District Judge George W. English, 1926: Tyranny, oppression, and partiality.

District Judge Harold Louderback, 1933: Favoritism, and conspiracy.

District Judge Halsted L. Ritter, 1936: Judicial improprieties, accepting legal fees while on the bench, bringing his court into scandal and disrepute, and failure to pay his income tax.

The bulk of these challenges to the court were thus on judicial misconduct, with scattered instances of nonjudicial behavior. In all cases, however, insofar as I have been able to thus far determine, the nonjudicial behavior involved clear violation of criminal or civil law, and not just a "pattern of behavior" that others might find less than "good."

If the House accepts precedent as a guide, then, an impeachment of a Justice of the Supreme Court based on charges which are neither unlawful in nature nor connected with the performance of his judicial duties would represent a highly dubious break with custom and tradition at a time when, as the gentleman from New York, (Mr. HORTON) stated last Wednesday:

> We are living in an era when the institutions of government and the people who man them are undergoing the severest tests in history.

There is merit, I think, in a strict construction of the words "good behavior" as including conduct which complies with judicial ethics while on the bench and with the criminal and civil laws while off the bench. Any other construction of the term would make judges vulnerable to any majority group in the Congress which held a common view of impropriety of conduct which was admittedly lawful. If lawful conduct can nevertheless be deemed an impeachable offense by a majority of the House, how can any Judge feel free to express opinions on controversial subjects off the bench? Is there anything in our history to indicate that the framers of our Constitution intended to preclude a judge from stating political views publicly, either orally or in writing? I have been unable to find any constitutional history to so indicate.

The gentleman from New Hampshire (Mr. WYMAN) suggests that a judge should not publicly declare his personal views on controversaires likely to come before the Court. This is certainly true. But it certainly does not preclude a judge from voicing personal political views, since political issues are not within the jurisdiction of the court and thus a judge's opinions on political matters would generally not be prejudicial to interpretations of the law which his jurisdiction is properly limited.

To subject a Judge to impeachment for controversial political views stated off the Bench has a ring of ex post facto unless there is some precedent which can be found in our own rather colorful history as a Nation.

Against this background of the impeachment power, I would now like to take up the factual allegations of misconduct made by the gentleman from Michigan.

It should be noted, first of all, that the attack on Justice Douglas specifically does not include attack on his judicial opinions, although there is reference to criticism of Justice Douglas for "liberal" opinions and reference to two specific decisions in a 31-year career on the Court, both of which are sharply controversial, the stay of execution granted to the Rosenbergs, and the dissent relating to the allegedly "filthy" film, "I am Curious, Yellow."

It is likewise conceded that it would be improper to exclude a man from the Court because of his ideology but much of the argument against Justice Douglas rests on the following references to his ideology:

1. "The article itself is not pornographic, although it praises the lusty, lurid and risque along with the social protest of *left-wing* folk-singers." (Emphasis added.)

2. "It (Justice Douglas' book) is a *fuzzy harangue intended to give historic legitimacy to the militant hippie-yippie movement* and to bear testimony that a 71-year old Justice of the Supreme Court is one in spirit with them." (Emphasis added.)

3. "One wonders how this *enthusiastic traveler inside the Iron Curtain* is able to warn seriously against alleged Washington hotel rooms equipped with two-way mirrors and microphones." (Emphasis added.)

4. "It is more serious than simply a summation of conventional *liberal* poppycock," as one columnist wrote. (Emphasis added.)

5. "Douglas described President-elect Bosch as an old friend" . . . and a few minutes later, "Juan Bosch was about to be inaugurated as the new *liberal* President." (Emphasis added.)

6. "Mr. Justice Douglas moved immediately into closer connection with the *leftish* 'Center for the Study of Democratic Institutions.'" (Emphasis added.)

7. In 1965 the Santa Barbara Center, which is tax-exempt and ostensibly serves as a scholarly retreat, sponsored and financed the National Conference for New Politics which was, in effect, the birth of the *New Left* as a political movement." (Emphasis added.)

8. *"Mr. Justice Douglas appears to represent . . . Dr. Robert Hutchins and his intellectual incubators for the New Left and the SDS and others of the same ilk."* (Emphasis added.)

If political philosophy is not a proper ground for impeachment, then why is there need to mention it at all in a discussion of alleged judicial misconduct which is limited to less than good behavior and excludes the question as to whether a man is conservative, moderate, or liberal?

I am impelled to note the similarity to Mark Antony's eloquence on Caesar's death: "For Brutus is an honorable man."

It is in the substance of the allegations of misconduct, however, where a strict construction of what is good behavior and what is not for impeachment purposes leads to a different conclusion than that impeachment is justified.

Essentially, five charges are made, only the first of which relates to alleged judicial misconduct on the bench. This is therefore the most serious charge, since admittedly judicial behavior short of criminal conduct has historical precedent as justifying impeachment.

THE FAILURE TO DISQUALIFY

Justice Douglas wrote an article on folk singing for the magazine Avant Garde at a time when a predecessor magazine was a defendant in a lower court case which could be, and was later, appealed to the Supreme Court. No allegation is made that Justice Douglas knew of the lawsuit when he wrote the article in question, or that he knew or dealt with the defendant publisher, Ginsberg.

After the article was written and a fee of $350 paid to Justice Douglas, the case was appealed to the Supreme Court. Justice Douglas did not disqualify himself, apparently believing that he was not in violation of title 28, United States Code 455, in that he did not have a "substantial interest in the case or had been so related to or connected with any party in the case to render it improper, in his opinion, to sit on the trial." No allegation appears in the record that Justice Douglas knew of the connection between the magazines or that the publisher was the same from whom he had received an author's fee or that a $350 fee paid for a magazine article is such a connection or relationship as to require disqualification. Reasonable minds may differ on this point, but standing alone it would hardly seem to justify the serious consideration of impeachment. The charge is made:

> Writing signed articles for notorious publications of a convicted pornographer is bad enough. Taking money from them is worse. Declining to disqualify one's self in this case is inexcusable.

The third statement might constitute misconduct, but any fair judge would require more factual evidence than that thus far presented. If there are other facts which would justify that his conduct is indeed as alleged: "insolence by which Mr. Justice Douglas has evidently decided to sully the high standards of his profession, and defy the conventions and convictions of decent Americans," then it seems to me that fairness would require their disclosure at this point in time.

It might also be noted that the statute which requires a judge to disqualify himself pointedly leaves this up to the judge's own decision:

> Any justice or judge of the United States should disqualify himself in any case in which he . . . is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal or other proceeding therein.

Opinions can change, and in retrospect judges sometimes look back and feel they should have disqualified themselves in cases on which they once elected to sit. President Nixon's present nominee to the Supreme Court, Circuit Court Judge Harry A. Blackmun, has forthrightly and candidly admitted just such a change of opinion from an earlier decision not to disqualify himself.

I suggest in considering this alleged impropriety of Justice Douglas we might properly pay heed to Ben Franklin's famous words on the final day of the Constitutional Convention of 1787:

> Mr. President, I confess that there are several parts of this Constitution which I do not

at present approve, but I am not sure I shall never approve them. For, having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions, even on important subjects, which I once thought right, but found to be otherwise. It is, therefore, that, the older I grow the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others . . ."

The second charge against Justice Douglas stems from his book, "Points of Rebellion." I have read the book since the speeches of last Wednesday evening, and while again reasonable minds may differ in interpretation, I would not necessarily call it any more a distorted diatribe against the Government of the United States, than some of the arguments I have heard in this House when we challenge some aspect of executive branch operation. Nor am I compelled to the conclusion that this book is based on the thesis that violence may be justified and perhaps only revolutionary overthrow of the establishment can save the country.

The language most seriously challenged that "redress, honored in tradition, is also revolution," seems more of a statement of fact than an exhortation to violence, especially when taken in context with later paragraphs expressing the thoughts that the revolution could be "in the nature of an explosive political regeneration," and the fear that America could face "an awful ordeal" if the alleged establishment became repressive.

The third charge relates to the publishing of excerpts from the book in the magazine, Evergreen in juxtaposition with other articles or drawings which are obscene or, if not, in exceedingly bad taste for any association with the dignity of the U.S. Supreme Court.

Conceding that such association is in bad taste, there is still no evidence stated in the record which would indicate Justice Douglas knew of his publisher's choice to permit the excerpted reprint that the Justice had expectation or control over what might be printed with it, or even whether the Justice had the right under the contract to stop publication.

From my personal experience as an attorney for both authors and publishers, an author does not generally have such right under the standard form of author-publisher contract.

The fourth charge alleges that for many years Justice Douglas was the paid president of the Albert Parvin Foundation, a foundation granted a tax exemption by the IRS, and that he "may" have helped set up the foundation and that he "apparently" gave legal advice to its creator, Mr. Parvin. Even with the immunity of allegations on the floor of the House, there is included in the record no unequivocal allegation that Justice Douglas did these things in violation of title 28, United States Code, section 454. It appears only that he "may" have done so or "apparently" did so. Certainly the receipt of funds for off-the-job services to foundations has only recently been considered as possibly improper for either judges or legislators. To criticize judges for past action at a time when we in the House have just begun to consider whether to disclose our own honoraria has a touch of ex post facto about it.

There are also alleged a number of associations, primarily between Albert Parvin and gmblers or between Parvin's attorneys and mobsters. There is the further allegation that Justice Douglas had taught former Justice Fortas in law school and that they remained the closest friends on and off the Supreme Court. In general, the associations complained of are between the associates of Justice Douglas and third parties, not between the Justice and such parties.

Where is there any legal or historical precedent for a charge of judicial misconduct against a judge for having questionable friends?

Boiled down to essentials, the case rests on, first, Justice Douglas' failure to disqualify himself in a case against a magazine where he had received a $350 fee from a successor magazine; second, views stated in a book; third, excerpts from such book being published in juxtaposition to tasteless articles or drawings by others; fourth, Justice Douglas' employment by a foundation of undetermined but allegedly "mysterious" activities, and, fifth, the association of Justice Douglas' associates with third parties.

In my humble judgment, these facts are inadequate to justify the extraordinary remedy of impeachment under the historic constitutional principles which I have set forth.

Preserving judicial independence seems to me a far more valuable benefit to this Nation than the impeachment of one judge on the facts which have thus far been brought to light. If additional facts are disclosed, of course, we might want to reexamine the situation. I contend only that the facts alleged last Wednesday do not meet the proper criteria of law and precedent the House should apply to the serious issue of impeachment.

In conclusion, I would like to apologize to my colleagues for the hasty research which has gone into the preparation of this argument. But for the sudden speed with which this immensely important issue has been placed before us, I would have liked to have had the privilege of many more quiet hours of historical research before imposing these views on the House. I will be grateful for such corrections as my more knowledgeable colleagues may call to my attention.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman.

Mr. GROSS. I thought the gentleman stated at the opening of his remarks that he was not rising in defense of Justice William O. Douglas?

Mr. McCLOSKEY. That is correct.

Mr. GROSS. I do not think anyone—and there are very few here—but I do not think anyone who has listened to the gentleman on the floor of the House could possibly construe what he has said as being anything but a defense of Douglas. That is No. 1——

Mr. McCLOSKEY. If I may respond to that, what I have tried to do is to take the factual allegations against Justice Douglas and compare them with the strict constitutional criteria of either good behavior or criminal conduct which we would require as prosecutors, if we were going to try to prove a case beyond a reasonable doubt. I have suggested that the historical and constitutional background of impeachment requires that we, as the House, as prosecutors, as the gentleman from Michigan suggested last week, have that same burden as any prosecutor has—that we must satisfy ourselves that the evidence presents a case beyond a reasonable doubt before we take it further. I contend that whatever Justice Douglas may be or whoever he is, the facts alleged against him do not meet that test.

Mr. GROSS. The gentleman seems to want to put Justice Douglas on the same footing as a Member of the House, for example.

Mr. McCLOSKEY. I would not ask of any Justice of the Supreme Court that he meet the same standards of judicial excellence and judicial behavior that the courts require themselves. This is a different standard of behavior as a Member of the House.

Mr. GROSS. I am speaking of the conduct or answerability to the public. The gentleman I think understands there is at least a slight difference between the two positions—a Justice of the U.S. Supreme Court, who is appointed for life, removable only for cause, and a Member of the House, who can be taken out at the end of every 2 years without very much difficulty by the voters.

Mr. McCLOSKEY. That is correct, and it was precisely the desire of the framers of the Constitution that we set aside our judges free from passion, prejudice, and attack by either legislative or executive branches so that they could deliberate on the major issues of our time without any worry about public clamor or popular views.

Mr. GROSS. A Justice of the Supreme Court is not on all fours with respect to the situation of a Member; is that correct?

Mr. YATES. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Illinois.

Mr. YATES. As I listened to the gentleman's speech, I thought the comparison the gentleman made, between members of the Supreme Court and Members of the House was with respect to the question of the payment of honorariums; namely, the gentleman was referring to the acceptance by Justice Douglas of a sum of money for serving on the foundation on which he served, and he compared that to the fact that Members of the House are finally looking into the question as to whether or not honoraria that they receive should be subject to public scrutiny.

Mr. GROSS. If the gentleman will yield, he was not predicating it on any single basis, that or the number of wives a Member of the House might have as compared to a Justice of the Supreme Court.

Mr. YATES. I was making my comment with respect to what the gentleman has said in his speech.

Mr. GROSS. He covered the waterfront.

Mr. YATES. No, he did not.

Mr. PUCINSKI. Mr. Speaker, will the gentleman yield

Mr. McCLOSKEY. I yield to the gentleman from Illinois.

Mr. PUCINSKI. I wish to congratulate my colleague for his scholarly presentation today. It brings into the subject some new dimensions of understanding. I think he has performed a most notable service to the House with the extensive research he has done.

But I am troubled with some of the conclusions that the gentleman has stated. We have a tendency to view the Supreme Court as an adjunct of government. Instead, it is a coequal branch of Government. coequal with the executive and the legislative branches.

Mr. McCLOSKEY. I have noted that we are quite free to criticize the Court, but when we refer to ourselves, it is only in terms that Congress in its wisdom has done something.

Mr. PUCINSKI. The fact of the matter is that the Supreme Court, made up of nine men appointed for life, is the keystone of the Republic. They are the ones who are charged with the responsibility of sitting in judgment over what we in the legislative branch do and what the executive branch does. So it would seem that because of the peculiar position, one, being coequal; two, being only nine men; and, three, having this awesome responsibility and authority, that their conduct at all times, unlike the conduct of the legislative or the executive, would be beyond reproach.

And I find it difficult to see how the American people can find confidence in and accept with no question the final judgments of the Supreme Court on these very important subjects that it rules on, when we find one member whose conduct does not beget such confidence. I find it difficult to understand how we can expect the American people to accept these judgments without question, and there has to be some final authority to settle the relationship in a free society.

When we see this one member of the Court permitting his publisher to have his works reprinted in a magazine which is hardcore pornography, a magazine that has run a scandalous cartoon of the President of the United States sitting on a throne as King George. I am not persuaded by my colleague's explanation that contracts between a publisher and author give the publisher the final authority. I am sure the gentleman is right, and I respect him as a lawyer, but again I say that as a Supreme Court Justice—and there are only nine in this country and in the world—that Supreme Court Justice must use prudence and judgment beyond that of the average citizen or average lawyer or average author or average writer or a Congressman or even the President.

Mr. McCLOSKEY. Mr. Speaker, I am sure on any future occasion anyone who may write an article, and particularly Justice Douglas or anyone in that high position, is going to look at the fine print in the contract between his publisher and himself to make sure he has some control over what is in the preceding and following pages where his article might appear.

I am only saying that generally the author does not have that right; that once it is published, the publisher owns the property; and that the sole obligation of the publisher is to pay the royalty to the author when the article is published wherever the publisher so chooses.

If there is evidence in the case brought before the House last Wednesday that Mr. Justice Douglas knew this article would be printed in juxtaposition with

these other things, I would say that is in bad taste, and there is some question of his judgment. But we sit here as prosecutors, and we are not to speculate. We would have to satisfy ourselves, as we would have ultimately to satisfy the Senate, that these facts are beyond doubt, and to speculate is beyond the dignity of the Congress of the United States.

Mr. PUCINSKI. I may be wrong, and time will have to prove that, but the gentleman tries to create the impression that Justice Douglas has a right to participate in a dual role, one, as a member of the high tribunal and, two, as a member of society who is just another citizen.

The thing that bothers me—and I may be wrong and time may prove me wrong—is I would think when one reflects upon the role of the Supreme Court and the nine Justices on that Court in this Republic of ours, we must also reflect that everybody loses confidence, the people lose confidence in this tribunal. The Court must be outstanding and enjoy the respect of the people, because it sits in final judgment.

I would say to the gentleman I think Justice Douglas has been wrong in assuming the role of an ordinary citizen when he ought to be exercising extraordinary prudence and watching every single thing he does because of the position he holds. That is the only point I make.

Mr. McCLOSKEY. I do not question that point, and I value the gentleman's contribution, and it behooves all of us as well as the court to try to reestablish the faith of the people in the Government and in the institutions of the United States, and I agree that his conduct should be exemplary.

I merely point out that when we write an article or a book, that has never been considered in the past to constitute a violation of our duties as public officials, and what we wanted to say outside the conduct of our official positions on political matters was not considered unethical or bad judgment such as to justify impeachment.

I do not disagree with what the gentleman says. I merely say if we add up that conduct against the very stern burden of proof we should require before we institute the very extraordinary means of impeachment—which, after all, is a means of attacking the stability of our institutions—we should demand a very strong burden of proof.

Mr. WHALEN. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Ohio.

Mr. WHALEN. Mr. Speaker, I thank the gentleman for yielding.

It would seem to me the gentleman from Illinois (Mr. PUCINSKI) is making the argument that the conduct of the Supreme Court Justices should be different and over and above that of Members of Congress, because of the awesome responsibility they seem to hold. I would suggest we in Congress have even greater responsibilities than members of the Supreme Court when one considers that we hold the power of life and death. This is certainly not a direct responsibility of the Supreme Court, although the Court occasionally decide on capital punishment cases.

It would seem to me that the Members of Congress, in approving these last number of years military appropriations which were used and expended in Vietnam, are certainly partially responsible for the death of 40,000 youngsters there.

In view of this awesome responsibility of Congress, perhaps the conduct of Members of Congress should be subjected to even higher standards than that of the members of the Supreme Court.

Mr. McCLOSKEY. I would agree with the gentleman that we are coequal branches of Government.

The gentleman from Illinois introduced the question as to how do we explain this to the people of the United States. I would suggest that there is a possibility the common man on the street, if he were asked what he was more concerned with, either the judicial declaration of the laws of the land by the Supreme Court and the interpretation of the laws passed by the Congress or, on the other hand, how his taxes are to be raised or lowered and how the $200 billion it is our responsibility to spend are spent, he might make a higher demand on those of us who initiate his taxes and spend his money.

Mr. YATES. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Illinois.

Mr. YATES. Have there not been Members of Congress who have also written articles published in magazines which others have classified as being pornographic?

Mr. McCLOSKEY. I should like to respond to the gentleman before yielding further.

As I mentioned, we in the Congress have seen fit on numerous occasions to challenge the judicial determinations of the Supreme Court. It would seem hardly fair to deny them carte blanche to speak on political matters which come before our jurisdiction.

Mr. YATES. Mr. Speaker, will the gentleman yield further?

Mr. McCLOSKEY. I yield.

Mr. YATES. I want to congratulate the gentleman on what I consider to be the most important thrust of his argument, and that is that the Members of the House should not go off half cocked or emotionally on this very grave charge which may lead to impeachment; that we ought to look at the facts unemotionally and dispassionately in this situation.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Iowa.

Mr. GROSS. What was the salary paid to Justice Douglas by the Parvin-Dohrmann Foundation?

Mr. McCLOSKEY. My understanding is it was $12,000 a year. I know it has been disclosed publicly that a U.S. Senator has received $20,000 a year plus travel and expenses. We raised no question about that.

Mr. GROSS. Of course, the gentleman and others seem to want to cast Justices of the Supreme Court on the same basis as Members of Congress. The public can get at every Senator every 6 years and at every Member of the House every 2 years, if they question his ethics or conduct.

Mr. McCLOSKEY. Do I understand the gentleman correctly that he would impose a different standard of conduct on the Supreme Court?

Mr. GROSS. Not at all. What I am saying is that the public has this opportunity, which they do not have in the case of a Justice of the Supreme Court.

That is what the gentleman from Illinois (Mr. PUCINSKI) was saying in another way.

Mr. McCLOSKEY. What I respond to that is that the constitutional framers of the United States intended that the people should not have that power, that we were to have a third branch of the Government, the judiciary, set apart from public clamor and complaint.

Mr. GROSS. So the gentleman believes it is all right for him to take $12,500 a year from the Parvin-Dohrmann Foundation and give tax advice to them while he sits as a Justice of the Supreme Court?

Mr. McCLOSKEY. I do not speak to the tax point at all. If there were an allegation made here, and made unequivocally, that he did give that tax advice, that is an entirely different matter.

Mr. GROSS. What about his salary? The gentleman agrees that a Justice of the Supreme Court should take a $12,500 salary from a foundation?

Mr. McCLOSKEY. I do not agree; but I do not believe, if I may say this in response to the gentleman from Iowa, that until this year, 1970, has the Government of the United States or the people of the United States come to the point where we say that our Congressmen or Senators or Supreme Court Justices should not accept honoraria for speeches or articles they write, or that the Supreme Court Justices or Members of Congress should not serve and receive compensation from nonprofit foundations.

My own personal judgment is that the jobs we hold and the jobs the Supreme Court Justices hold require so much of our time that none of us should accept compensation from any other source. But we have not yet determined that in our own rules for ourselves. This would impose an ex post facto provision on the Supreme Court Justice, when many Members of Congress receive far more than $12,500 a year for working outside their own duties, and I believe that is stretching it pretty far.

Mr. GROSS. Of course, this was not an honorarium. It is a salary they paid. The $12,500 from this foundation was a salary, not an honorarium.

I agree with the gentleman with respect to honoraria. I certainly do. Certainly, Members of Congress should conduct themselves properly and be held to it. However, there is a vast difference between a man who is appointed for life to serve on the Supreme Court made up of nine men and a man who serves in the House of Representatives in that respect.

Mr. PUCINSKI. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Illinois.

Mr. PUCINSKI. I wonder if my colleague from Ohio and my colleague from Illinois (Mr. YATES) would address themselves to the very important distinction that the gentleman from Iowa makes?

It is true that whenever a Member of the legislative branch of Government or a member of the executive branch of Government strays off the beaten path, the voters, the American people, have an opportunity to deal with his conduct every 2 years in the case of a Member of Congress, every 4 years in the case of the President, and every 6 years in the case of a Senator. But what is the rule with respect to this sort of conduct when one has a lifetime appointment on the Supreme Court? Do we expect a different course of conduct from the Justices than we do from the other two branches of Government? They say, "No, we do not, but we do believe when they do engage in conduct that is seriously questionable, the legislative branch under the Constitution has a right to look into it." That is exactly what the gentleman from New York (Mr. CELLER), the chairman of the Committee on the Judiciary, is doing at this time.

However, I would like to hear my colleagues address themselves to the basic differences between the legislative branch service and conduct and the Supreme Court Justices who enjoy a lifetime appointment. The only way you can change it is to enact my legislation to limit the term of the Supreme Court Justices to 14 years. At that time their term will expire as is true with reference to the Federal Reserve Board and you would have some new blood coming onto the Supreme Court Bench.

But how do you deal with a problem like this which is now pending before us?

Mr. McCLOSKEY. If I may respond to one of those points first, I conducted a poll of my constituency recently and the result of that poll reflected that 82 percent felt that all Justices ought to retire at age 70 and an even higher percentage of my constituency in that poll thought that each Congressman should retire at the age of 70.

I do not question the fact that the Government of the United States might benefit if we had a mandatory retirement age. But I do say what is being forgotten in this discussion by the gentleman from Illinois, is that we have made a distinction between Supreme Court Justices and elected officials, because we have deliberately through our colonial history and possibly as a result of our dealings with the British Crown wanted to have the privilege of judges sitting in independent judgment. We have had long experience with legislation perhaps because the King removed certain justices because they may have from time to time disagreed with his policies. Therefore, we chose to have judicial independence so that those justices could deliberate without the fear that some of their conduct might result in the termination of the payment of their salary.

I have tried to point out the fact that we must balance the disrespect that we may feel that the Justice has brought upon himself against the need to preserve an independent judiciary because long after a personality may have been forgotten, we must have an independent judiciary free to deliberate on the issues of law which is far more desirable than the temporary disappointment we may feel against an individual whom we may feel has brought this upon us.

Mr. PUCINSKI. Mr. Speaker, if the gentleman will yield further, this is why I think this dissertation by the gentleman is so necessary and is deserving of the in-depth study which the gentleman

has made. However, I think it proves what we have been saying, and that is that the Founding Fathers did draw a distinction between the executive, the legislative, and the Supreme Court to the effect that the conduct of those nine Justices, unlike any other American, must be of extraordinary prudence.

Mr. McCLOSKEY. We are in agreement, but if we ask judicial restraint we should as Members of Congress exercise legislative restraint when we criticize the Court. We also must not bring disrespect upon the law and the institutions of this country. And, when we ask the young people of the land to obey the law and respect it, at the same time we may contribute ourselves to a great disaffection between the public and the law and the Government that administers that law.

Mr. FOLEY. Mr. Speaker, I want to compliment the gentleman on his presentation and the legal research that he has so carefully undertaken. I think he has added a new scope and dimension to this question. In view of an earlier comment by the gentleman from Iowa (Mr. GROSS), I want to say on my own behalf, that I think I understand very clearly why the gentleman from California has made his statement. I do not regard his remarks as being a personal defense of Justice Douglas. I believe the gentleman is deeply concerned, as I am with the independence of the judiciary. I think the gentleman is saying that regardless of the personal feelings or attitudes of individual Members, the question of impeachment of a Justice is one that should be approached with the most serious caution and restraint, with the deepest concern for precedent and then only on compelling evidence of judicial or other misconduct justifies so grave a remedy.

As I understand the gentleman, he is stating that allegations made earlier this week by the distinguished minority leader, are not of themselves and without additional evidence of misconduct sufficient to justify impeachment.

Mr. McCLOSKEY. I thank the gentleman for that statement.

Mr. FOLEY. I wonder if I could ask the gentleman a question.

It is my understanding that since 1813 when the Judiciary Committee of the House of Representatives was established as a permanent committee of this House there have been some 40 impeachment proceedings involving judges. In each of those save one the jurisdiction has gone to the Judiciary Committee; the one exception occurring in 1839.

Does the gentleman feel there is a basis now to ignore the 130-year tradition of presenting questions of impeachment or investigation of impeachment to the Committee on the Judiciary and instead of that adopting a proposal to set up a select committee to conduct an impeachment investigation?

Mr. McCLOSKEY. I can only say from my own research and experience I do not believe that my experience in the House makes me competent to comment on that. As much as younger Members would like to see procedures of the House changed, we all recognize the wisdom and the experience which has gone into the formulation of the rules, so that we do not want to consider changing them lightly. Precedent is a part of the law. It is a very important part. People try to predict what action the courts will take on the basis of precedent and on how they have acted earlier. I consider the court precedents one of the great parts of the fabric of the law that hold the country together. We have a common understanding of how the law will be implemented, because the courts have so construed these laws in the past. I would not like to change that precedent. And I will say further that my own research and experience does not include that knowledge that the gentleman calls for.

Mr. WHALEN. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Ohio.

Mr. WHALEN. Mr. Speaker, I would like to respond briefly to the questions posed by the gentleman from Illinois (Mr. PUCINSKI) relative to the conduct of Members of Congress vis-a-vis the conduct of members of the Supreme Court. I make four observations in this regard.

First, the conduct of Members of both bodies should be above reproach.

Second, I believe for that reason there should be no dual standard. The conduct of members of the Supreme Court should not be more above reproach than that of Members of the House and Senate. As I mentioned previously, we not only theoretically are coequal, but in practical terms Members of Congress actually wield more power, the power of life and death, than do the members of the Supreme Court.

Third, I would say that if Justice Douglas at this time were a member of the court of appeals and had been nominated for membership on the Supreme Court, his conduct probably would lead to the defeat of that nomination just as it did in the case of Mr. Carswell, Mr. Haynsworth, and Mr. Fortas.

The fourth point I would like to make is simply this: that this is not a confirmation proceeding. For justice Douglas, that decision was made 31 years ago. Rather we are talking here about impeachment.

I think that the basic question, the one that the gentleman (Mr. McCLOSKEY) raised, is while Justice Douglas' conduct may be questionable, is it impeachable? Should it lead to impeachment? And to my knowledge and my research on it I have seen no evidence that laws have been broken. His conduct on occasion may have been questioned, but certainly I have seen no evidence in my research that it should lead to impeachment of Justice Douglas.

Mr. McCLOSKEY. I am glad the gentleman has made the third and fourth points, because I gathered from the dialog last Wednesday that there were Members who feel that the same criteria should be applied as to Justices under consideration for appointment as to the impeachment of a Justice. And the thrust of my remarks is essentially that this is incorrect, because while we should carefully scrutinize the ability, background, and every aspect of the past behavior of men who are desiring to be appointed to the high office, when we are considering impeachment we are also considering legislative intrusion into judicial activity, and there our constitutional backgrounds and history show the framers of the Constitution clearly wanted to remove the sitting Justices of the Supreme Court from any fear or consideration for their removal because of their political views or because of some dissatisfactory type of service of less than the ablest judge on the Bench. And it is the whole thrust of the remarks that we should not be led in the fashions of the moment into consideration of less than impeachable criteria unless determined by precedent.

When we have had some 181 years of our Government, and only nine cases of impeaching judges, and where in all those instances it was either for criminal behavior or behavior on the Bench which was primarily not judicial in nature, I think we should go very slowly before bringing an impeachment proceeding without showing that those criteria have been met.

Mr. PUCINSKI. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman from Illinois.

Mr. PUCINSKI. Mr. Speaker, I certainly would agree with my colleague from Ohio on all four of his points. I would not want the RECORD to indicate in any manner we are trying to set up a dual standard on personal conduct or ethics.

But I do believe there is a basic difference between a Member of the legislative branch of the Government, the President, a member of the executive branch of the Government, and the judiciary. We in this House are divided through the two-party system, there is a majority leader and a minority leader. The very essence of the two-party system of our political institution is reflected every day in this House. It is also reflected in the philosophy that the White House adopts in the executive branch of the Government, and that shows the wisdom of the Founding Fathers, that the third coequal branch of the Government, the Supreme Court, is totally apolitical. Its only responsibility is to interpret our actions as they apply to the Constittion.

So I say again—and I must admit with my colleague that I believe that impeachment might be a very extraordinary effort, that we do not want to take in this case. I think the gentleman has done a good job today in putting into proper perspective the dilemma we find ourselves in here, but the fact still is that this does not in any way mitigate the fact that a Supreme Court Justice, unlike any other citizen in this Republic, has to be extraordinarily careful of his conduct, and his prudence. If anything, I think that Justice Douglas has been imprudent.

Now, there is a charge against that, but I am not too sure that we have a clear case or showing for this in trying to pursue the impeachment road. That is why I feel that we ultimately ought to have a 14-year limitation as a constitutional amendment, or whatever it takes, on Supreme Court Justices, because then we would not have that question, and this would take care of both good Justices and bad Justices.

Mr. McCLOSKEY. Mr. Speaker, I want to commend the gentleman for that suggestion, because I do think that in these years of rapidly changing technology, population explosion, and the tremendous pressures that our institutions are under to respond to the tremendous new problems that were not the case earlier, we do benefit by a more rapid turnover of our executive and of our legislative branches.

I, myself, lean toward the position of retirement at age 70, rather than a fixed term of years for Supreme Court Justices.

I hope that this dialog will be carried on and that further consideration will be given in the 91st Congress to this subject.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. McCLOSKEY. I yield to the gentleman.

Mr. GROSS. Does the gentleman know whether Justice Douglas signed his wide-open contract with the book publisher after the article appeared in Avant Garde or whatever the name of the publication?

Mr. McCLOSKEY. I have no idea of the facts of that matter other than as was set forth in the RECORD last Wednesday by the distinguished minority leader and the gentleman from New Hampshire (Mr. WYMAN). I have no idea of the facts at all in this case and I make no defense of the Justice and I attack him not.

But I do think, looking at the facts in the RECORD, that they would not be sufficient to justify impeachment and that is one of the questions that should be understood before impeachment were to be considered.

Mr. GROSS. If the gentleman will indulge me in one quick observation, I think that the Justices of the Supreme Court have all that they can do to take care of the business of the Supreme Court without going outside to serve as tax advisers on cases that may come before them for solution at a later time.

I can recall one writ that has been pending before the U.S. Supreme Court since January of 1966 and it has not yet been disposed of—and that is 4 years ago.

Mr. McCLOSKEY. I fully agree with the gentleman. I think of all the remarks I have heard the distinguished gentleman from Iowa make, his comments last week, when he was advised of the legislative schedule for this week, on what we ought to do, to give consideration to turning back some of our pay, is the most impressive that I have heard. I think we should impose on the Supreme Court and all the Justices of the U.S. district courts and appellate courts a full working day and more rapid handling of cases before them.

I hesitate, however, to criticize the Court when I feel that we here in the Congress are the ones considering the issue of impeachment, and this is our obligation, to impose legislative restraint and caution on ourselves.